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**Charities and the Anti-terrorism
Financing/ Money Laundering Regime**

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CHARITIES AND THE ANTI-TERRORISM FINANCING/ MONEY LAUNDERING REGIME

October 6, 2011

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A. INTRODUCTION

The 2001 terrorist attacks on New York City, Pennsylvania and Washington, D.C. prompted the introduction of increasingly strict anti-terrorism legislative measures around the world. The ongoing threat of further attacks has not dissipated and the political will to eradicate terrorist organizations and their supporters remains strong. In this regard, charities remain a significant focus of the war on terror as such organizations have repeatedly been dubbed the purported “crucial weak point.”¹

The co-ordinated attack on terrorist financing and activities has revealed that in many cases, charitable activities that were previously thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated “terrorist activities” or for supporting “terrorist groups.” This, in turn, may result in a charity losing its charitable status and its directors and officers being exposed to personal liability and even criminal prosecution. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity’s financial activities.

In order to see how the various parts of Canada’s anti-terrorism legislation interact with each other, as well as how the legislation may affect charities, this paper will examine some of the more important anti-terrorism provisions under the amended *Criminal Code*, the amendments

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¹ Financial Action Task Force on Money Laundering, “Combating the Abuse of Non-Profit Organisations: International Best Practices”, (Paris: FATF, 2002) at 1, online: FATF/GAFI < <http://www.fatf-gafi.org/dataoecd/53/53/34260889.pdf> >.

made to money laundering legislation, as well as legislation providing for the de-registration of charities. The paper will then outline the importance of charities adopting due diligence practices and different factors to take into consideration when adopting a due diligence approach.

B. ANTI-TERRORISM LEGISLATION IN CANADA

Canada's anti-terrorism legislation has not been enacted in a legal vacuum. Most conceivable acts of terrorism have for some time been subject to prosecution in one way or another as criminal offences under the provisions of Canada's *Criminal Code*.² Many other statutes, such as the *Immigration and Refugee Protection Act*,³ include provisions that deal with terrorism or people suspected of terrorism. The provisions and the legislative amendments provided for under Canada's anti-terrorism legislation were likely under development for some time, purportedly in order to supplement the legislation that was already in place prior to 2001. The events of September 11, 2001 ("September 11") simply galvanized these efforts, giving them a sense of added urgency and political justification.

In Canada, the four legislative initiatives were:

1. Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to Enact Measures Respecting the Registration of Charities, In Order to Combat Terrorism* ("Anti-terrorism Act"), which includes the *Charities Registration (Security Information) Act* ("CRSIA") as Part VI of the *Anti-terrorism Act*,⁴

² *Criminal Code*, RSC 1985, c C-46.. See for example, s. 7 for offences committed on aircraft. See also Kent Roach, "The New Terrorism Offences and the Criminal Law" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) 151 at 152-154 ["New Terrorism Offences and Criminal Law"]; see also Kent Roach, *September 11: Consequences for Canada* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 29-33 [*September 11: Consequences for Canada*].

³ *Immigration and Refugee Protection Act*, SC 2001, c 27.

⁴ Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess, 37th Parl, 2001, (royal assent 18 December 2001), SC 2001, c 41 ["Anti-terrorism Act"].

2. Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* (“*Foreign Missions Act*”);⁵
3. Bill C-7, *An Act to amend certain Acts of Canada, and to Enact Measures for Implementing the Biological and Toxin Weapons Convention, In Order to Enhance Public Safety* (“*Public Safety Act*”);⁶ and,
4. Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* (“*Bill C-25*”).⁷

While other statutes deal with issues related to terrorism, for the purposes of this paper, the above four pieces of legislation are collectively referred to as Canada’s anti-terrorism legislation.

1. International Legislative Context

In order to understand the long-term impact of Canada’s anti-terrorism legislation beyond September 11, Canada’s legislative initiative must be viewed within the international context in which it has evolved.⁸ Over the last two to three decades, the international community has developed a broad range of measures that have attempted to combat terrorism. These documents range from non-binding resolutions, declarations, or recommendations of the United Nations General Assembly and various intergovernmental bodies, to binding multilateral conventions and Security Council Resolutions. Canada has also been involved in several other international organizations or intergovernmental policy-making bodies, such as

⁵ Bill C-35, *An Act to amend the Foreign Missions and International Organizations Act*, 1st Sess, 37th Parl, 2002, (royal assent 30 April 2002), SC 2002, c 12 [“*Foreign Missions Act*”].

⁶ Bill C-7, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, 3rd Sess, 37th Parl, 2004, (royal assent 6 May 2004), SC 2004, c 15 [“*Public Safety Act*”].

⁷ Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, 1st Sess, 39th Parl, 2006, (royal assent 14 December 2006), SC 2006, c 12 [“*Bill C-25*”].

⁸ For general updates on proposed and actual changes in counter-terrorism laws, policies and practices and their impact on human rights at the national, regional and international levels, visit: The International Commission of Jurists, “E-Bulletins on Counter-Terrorism and Human Rights”, online:

<http://www.icj.org/default.asp?nodeID=401&langage=1&myPage=E-Bulletin_on_Counter-terrorism_and_Human_Rights>.

the G-8, G-20, the Financial Action Task Force on Money Laundering (“FATF”), the International Monetary Fund, and the World Bank, as part of Canada’s current commitment to combat terrorism. All of these bodies have and continue to take measures to curtail terrorism and terrorist financing, and require considerably different levels of compliance from member states.

The enactment of Canadian legislation is directly related to developments in the international arena. This is reflected in the preambles to the four Acts making up the anti-terrorism legislation, which include references to Canada’s “commitments” to international treaties and its response to developments in international law or participation in a global anti-terrorism initiative. It is beyond the scope of this paper to examine the international context in detail, but the main international documents are highlighted below to provide a brief overview of the international dynamics behind the more recent legislative initiatives in Canada.

2. United Nations Commitments

Over the years, the United Nations has issued a number of resolutions and declarations, and has concluded various conventions, all in an effort to combat terrorism. The *Anti-terrorism Act* specifically enabled Canada to fulfil a number of its international obligations and commitments. For example, twelve major international legal instruments dealing with terrorism and related issues also existed prior to the 2001 attacks. Canada was already a State Party to ten of the twelve instruments, and the adoption of the *Anti-terrorism Act* enabled Canada to ratify and implement the remaining two, namely the *International Convention for the Suppression of Terrorist Bombings* (signed in 1998, ratified in 2002) and the *International Convention for the Suppression of the Financing of Terrorism* (signed in 2000, ratified in 2002). Another significant United Nations obligation was Security Council Resolution 1373, adopted on September 28, 2001.⁹ These documents collectively explain Canada’s international obligations to limit terrorism and sheds light on the extent to which Canada’s initiative is consistent with those obligations. They also provide a useful background to understanding the legal paradigm facing charities that operate in multiple jurisdictions.

⁹ UNSCOR, 4385th Mtg, UN Doc S/RES/1373 (2001) [“Resolution 1373”].

Multilateral Conventions referred to in the *Anti-terrorism Act* include the following:

- the *Convention on the Safety of United Nations and Associated Personnel*;¹⁰
- the *Convention on the Suppression of Unlawful Seizure of Aircraft*;¹¹
- the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;¹²
- the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*;¹³
- the *International Convention against the Taking of Hostages*;¹⁴
- the *Convention on the Physical Protection of Nuclear Material*;¹⁵
- the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;¹⁶
- the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*;¹⁷
- the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*;¹⁸
- the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*;¹⁹
- the *International Convention for the Suppression of Terrorist Bombings*;²⁰ and

¹⁰ *Convention on the Safety of United Nations and Associated Personnel*, A/RES/49/59, UNGAOR, 49th Sess, UN Doc A/49/PV.84 (1994)..

¹¹ *Convention on the Suppression of Unlawful Seizure of Aircraft*, UNTSOR, UN Doc I-12325, (1971) vol 860 at 105.

¹² *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, UNTSOR, UN Doc I-14118, (1971) vol 974 at 178.

¹³ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, UNTSOR, UN Doc I-15410, (1977) vol 1035 at 167.

¹⁴ *International Convention against the Taking of Hostages*, UNTSOR, UN Doc I-21931, (1983) vol 1316 at 205.

¹⁵ *Convention on the Physical Protection of Nuclear Material*, UNTSOR, UN Doc I-24631, (1980) vol 1456 at 125.

¹⁶ *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, UNTSOR, UN Doc A-14118, (1988) vol 1589 at 474.

¹⁷ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, UNTSOR, UN Doc I-29004, (1988) vol 1678 at 222.

¹⁸ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, UNTSOR, UN Doc I-29004, (1988) vol 1678 at 304.

¹⁹ *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, SC Res 635(1989), UNSCOR, 2869th Mtg, (1989) at 18.

²⁰ *International Convention for the Suppression of Terrorist Bombings*, GA Res A/RES/52/164, UNGAOR, 52nd Sess, U.N. Doc. A/52/PV.72 (1997) ["Convention on Terrorist Bombings"].

- the *International Convention for the Suppression of the Financing of Terrorism*.²¹

A thirteenth international convention, the *International Convention for the Suppression of Acts of Nuclear Terrorism*, has since been adopted. Canada signed this convention in September 2005 but has not yet ratified it.²²

C. “SUPER CRIMINAL CODE”: NEW DEFINITIONS AND IMPLICATIONS FOR CHARITIES

The amendments to the *Criminal Code* implemented by the *Anti-terrorism Act*, under Part II.1, constitute the creation of a new type of criminal offence under the heading of “Terrorism.” The assumption underlying these amendments to the *Criminal Code* is that certain offences, specifically terrorism offences, including the threat of or attempt to commit such offences, warrant an extraordinary approach in the methods of investigation, incarceration and punishment due to the very nature of those offences.

The idea that some criminal offences are extraordinary in nature is not new. This principle most recently received expression in the *Crimes Against Humanity and War Crimes Act*.²³ However, even the *War Crimes Act* contains substantially more principles of natural justice than are to be found in the amendments to the *Criminal Code* provided for under the *Anti-terrorism Act*.²⁴ The amendments implemented by the *Anti-terrorism Act* arguably amounted to the creation of a “Super *Criminal Code*” within Canada’s existing *Criminal Code*. As such, charities need to become proactive in understanding the law and its impact on their operations or risk facing serious repercussions. While it is beyond the scope of this paper to discuss in any detail the ramifications of this “Super *Criminal Code*,” this paper does review those areas of the amended *Criminal Code* that impact charities, with particular reference to the definitions of “terrorist activity,” “terrorist group,” and “facilitating terrorist activities” implemented by the *Anti-terrorism Act*.

²¹ International Convention for the Suppression of the Financing of Terrorism, GA Res A/RES/54/109, UNGAOR, 54th Sess, U.N. Doc. A/54/PV.76 (1999) [“Convention on Terrorist Financing”].

²² Permanent Mission of Canada to the United Nations, “Fighting International Terrorism and Crime” (Last Modified: 18 May 2011), online: Government of Canada, <http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/positions-orientations/peace-paix/terrorism-terrorisme.aspx?lang=eng&view=d>.

²³ *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [“*War Crimes Act*”].

²⁴ *Ibid.* Specifically, s. 10 applies the rules of evidence and procedure in force at the time of proceedings and s. 11 allows the defendant all defences and justifications that are otherwise available under Canadian or international law at the time of the offence or proceedings.

1. Definitions under the *Anti-terrorism Act*

a) “Terrorist activity”

The definition of “terrorist activities” in section 83.01(1) of the *Criminal Code*, as amended by section 4 of the *Anti-terrorism Act*, is split into two disjunctive parts (a) and (b).

Part (a) of the definition of “terrorist activity” incorporates ten offences that already exist under section 7 of the *Criminal Code*, each of which implements a specific U.N. Convention regarding terrorism. These provisions include various offences against “internationally protected persons” under subsection 7(3). Combined with section 431 of the *Criminal Code* and specifically the amended definition of “internationally protected persons” in the *Foreign Missions Act*, part (a) of section 83.01(1), as will be seen later in this paper, could negatively impact charities in some situations.

The more familiar part of the definition of “terrorist activity” is contained in part (b) of section 83.01(1). It defines a “terrorist activity” as:

b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person’s life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or

private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)

Both of these parts of the definition include conspiracy, attempt or threat to commit a terrorist activity, as well as being an accessory after the fact or counselling in relation to any “terrorist activity.” This definition is very broad and covers situations that may impact charities, including acts or omissions, both in and outside of Canada, and committed in whole or in part for political, religious or ideological purposes, objectives or causes.

b) “Terrorist group”

A “terrorist group” under subsection 83.01(1) of the *Criminal Code*, as amended by the *Anti-terrorism Act*, is defined as:

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity [as defined in subsection 83.01(1) and discussed above], or*
- (b) a listed entity, [as defined by section 83.05 and discussed below] and includes an association of such entities.*

The definition of “terrorist group” is very broad and could include unsuspecting charities if they are not diligent. In this regard, the reference to “entity” casts a broad net by including trusts, unincorporated associations and organizations, as well as an association of such entities.

Even the inclusion of “listed entities” is problematic, since, as discussed later in this paper,²⁵ even some well-known charities could in theory find themselves a “listed entity” in consideration of the nature and location in conflict zones of the international humanitarian work that they do if the Government felt that it had “reasonable grounds” to believe the entity had knowingly carried out, attempted to carry out, participated in, or *facilitated* a terrorist activity. Given the breadth in the definition of “facilitate” as

²⁵ Discussed in greater detail in the section “Inclusion as a “Listed Entity”” below.

explained below, the definition of “terrorist group” under either paragraph 83.01(1)(a) and (b) of the *Criminal Code* could apply to charitable organizations that have no direct or indirect involvement or intention to participate in “terrorist activities.” As an illustration of the far-reaching effect of this legislation, it would cover the situation of a charity, which through a fundraiser in Canada, requests the provision of medical supplies to fund a third party in the Middle East and gives instructions to the third party to use the supplies at a hospital that might treat or give medicine to a member of a terrorist group. In this regard, the expansive definition of “terrorist group” may leave open the possibility that many legitimate charities in Canada could fall within the breadth of this definition.

c) “Facilitating Terrorist Activity”

Subsection 83.19(2) defines “facilitation” as follows:

For the purposes of this Part, a terrorist activity is facilitated whether or not

- (a) the facilitator knows that a particular terrorist activity is facilitated;*
- (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or*
- (c) any terrorist activity was actually carried out.*

A plain reading of this subsection implies the *mens rea* element of the offence has been diminished to the point that it verges on a strict liability offence. In her appearance before the House of Commons Standing Committee on Justice and Human Rights in November 2001, then Justice Minister Anne McLellan stated that the purpose for moving the definition of “facilitate” from section 83.01 (the definitions section) to section 83.19 was to respond to criticism that the separation of the definition from the offence was confusing and failed to clearly emphasize that facilitation must be “knowing.”²⁶ The stated purpose of subsection 83.19(2) is to capture circumstances in which the person is prepared to assist a terrorist group without particularly knowing the specific objective,²⁷

²⁶ Anne McLellan, “Notes for the Justice Minister” (Appearance before the House of Commons Standing Committee on Justice and Human Rights – Bill C-36, November 2001).

²⁷ Richard G. Mosley, “Preventing Terrorism. Bill C-36: The *Anti-terrorism Act* 2001” (Paper presented to the Terrorism, Law & Democracy: How is Canada Changing following September 11? Conference, March 2002) 145 at 165. Mr. Mosley is the Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada.

yet its wording can be read as nothing more than a qualification of the fault element of subsection 83.19(1), which provides that “every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”

From a practical standpoint, a charity could very well become involved unwittingly in violating the *Criminal Code* in “facilitating terrorist activity” without actually intending to directly or indirectly support any terrorist activity whatsoever and without knowing or even imagining the ramifications of their actions. This concern is particularly relevant in the wake of recent natural disasters, like the destructive earthquake in Pakistan in October 2005, and the devastating tsunamis that hit Southeast Asia in December 2004 and Japan in March 2011, all of which prompted an outpouring of international humanitarian support. Despite the desperate need for aid in these areas, charities still have to comply with the significant legal requirements in providing aid, regardless of their size or the method of providing assistance.

At the same time, the potential application of anti-terrorism legislation is heightened, in part, because some of these geographic areas have been identified as one of the central operating areas for several terrorist organizations.²⁸ The chances of contravening anti-terrorism legislation are heightened even more when charities are not able to deliver aid directly and instead must support local recipient organizations in the regions. In this situation, the charities are accountable for the recipient organization’s actions with regard to terrorist activities and are therefore responsible for conducting appropriate due diligence investigations of the recipient organizations.

d) *R. v. Khawaja*²⁹

In a decision released December 17, 2010, the Ontario Court of Appeal overturned a lower court ruling which called into question the constitutionality of the “motive clause”

²⁸ For more discussion on this topic, see Terrance S. Carter & Sean S. Carter, “Anti-terrorism legislation requires due diligence from tsunami relief agencies”, *The Lawyers Weekly* (11 March 2005) 9, online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=48>>; Terrance S. Carter & Sean S. Carter, “The Implications for Charities of Anti-Terrorism Initiatives on Humanitarian Assistance for Southeast Asia” (2005) Anti-Terrorism and Charity Law Alert No. 6, online: <<http://www.carters.ca/pub/alert/atcla/atcla06.pdf>>.

²⁹ *R v Khawaja*, 2010 ONCA 862, 103 OR (3d) 321, [2010] O.J. No. 5471 (Ont CA) [*Khawaja*].

contained in the definition of “terrorist activity” in the *Criminal Code*. In the previous decision of the Ontario Superior Court of Justice in *R. v. Khawaja*,³⁰ the court struck down a portion of a definition of “terrorist activity” that dealt with purpose and motive and decided to uphold the law in terms of its breadth and the *mens rea* requirement concerning the definition of “facilitation.” The Ontario Court of Appeal overturned this decision and concluded that although violent activity may convey meaning, it is excluded from constitutional protection “because violence is so destructive of the very values that underlie the right to freedom of expression and that makes this right so central to both individual fulfillment and the functioning of a free and democratic society.”³¹

The Court of Appeal concluded that the motive requirement was not unconstitutional and upheld the definition of “terrorist activity.” The mental component, according to the Court, is separated into three parts: (1) the act or omission must be done with the intention of bringing about death, bodily harm, endangering a person’s life, causing serious risk to the health or safety of the public, causing substantial property damage or causing serious interference with an essential service; (2) the act or omission must be done with the further intention of intimidating the public or compelling a person, government or organization to do or refrain from doing any act; and (3) the act or omission must be done for a political, religious or ideological purpose, objective or cause. Therefore, this decision and section 83.19 in the *Criminal Code* would appear to be saying two different things. *Khawaja* requires *mens rea* for “terrorist activity” notwithstanding that section 83.19 does not make *mens rea* a requisite element of the offence of “*facilitating* terrorist activity”.

Application for leave to appeal to the Supreme Court of Canada (“SCC”) was granted without costs on June 30, 2011.³² Notice of appeal was filed August 29, 2011 but has not yet been inscribed for hearing. *Mohammad Momin Khawaja v. Her Majesty the Queen (Ontario)* is tentatively scheduled to be heard before the SCC on April 11, 2012.

³⁰ *R v Khawaja*, [2006] OJ No 4245, 214 CCC (3d) 399 (Sup CJ).

³¹ *Supra* note 29 at para 101.

³² *R v Khawaja*, [2011] SCCA No 80, [2011] CSCR No 80 (CASCC).

The *Khawaja* decision was the first major challenge to Canada's broad anti-terrorism legislation. Although the *Khawaja* decision confirms the validity of a key component of the anti-terrorism regime, the breadth of the government's powers to combat terrorism remains largely unchallenged for both individuals and organizations under suspicion.

e) "Financing of Terrorism"

The offences contained in the "Financing of Terrorism" section of the *Criminal Code*, as amended by the *Anti-terrorism Act*, are contained in subsections 83.02, 83.03 and 83.04. These provisions make it a criminal offence to collect, use, possess, provide or invite a person to provide, make available property or financial or other related services, intending or knowing that it be used in whole or part for various purposes. Depending on the provision, the prohibited purposes range from the commission of a "terrorist activity", to "benefiting" a "terrorist group" or "any person facilitating or carrying out a terrorist activity".

These offences relating to terrorist financing are broad and potentially uncertain in scope, using phrases such as "directly or indirectly", "in whole or in part", "facilitating", and "benefiting". Under these terrorist financing provisions, for example, it is an offence to "indirectly provide related services which will be used, in part, for the purpose of benefiting a person who is facilitating any terrorist activity" or to "indirectly use property, in part, for the purpose of facilitating terrorist activity".³³ In conjunction with the definition of "facilitation," these provisions cast a significantly broad net in order to encompass any economic connection, however remote, with "terrorist activities."

These provisions dealing with financing of terrorism had remained dormant until March 14, 2008, when the first person in Canada to be charged with terrorism financing was arrested in New Westminster, British Columbia. In the case of *R. v. Thambathurai*,³⁴ the accused was charged with committing an offence under section 83.03(b) of the *Criminal Code*, the section that makes it an offence to provide or make available property or services for terrorist purposes. It was alleged that Mr. Thambathurai solicited donations

³³ Canadian Bar Association, *Submission on the Three-Year Review of the Anti-terrorism Act* (May 2005).

³⁴ *R v Thambathurai*, 2010 BCSC 1949, [2011] BCJ No 2810 (BCSC).

in British Columbia for the World Tamil Movement (WTM), a humanitarian organization which the police claim was the leading Liberation Tigers of Tamil Eelam (“LTTE”) front organization in Canada. On May 11, 2011, the accused plead guilty to the charge of providing financial services knowing that they would benefit a terrorist group after admitting to police that a portion of the money he raised for Tamil humanitarian aid would go to the LTTE, a “listed entity” pursuant to section 83.05(1) of the *Criminal Code*. On May 14, 2011, the British Columbia Supreme Court sentenced Mr. Thambathurai to six months in jail. The Crown appealed that sentence to the British Columbia Court of Appeal, arguing the sentencing judge failed to fully appreciate the seriousness of the offence, resulting in a sentence that was unfit, and asked for a sentence of two years incarceration.³⁵ The appeal was dismissed. This does not produce much useful analysis of the offence as a result of the guilty plea. However, it still merits careful attention from charities and not-for-profits, as it highlights an increasing level of scrutiny by law enforcement and regulators concerning fundraising activities that are suspected of supporting terrorist activities.

Specifically relating to charities, on July 17, 2010, Canada Revenue Agency (“CRA”) posted a news release on their website that the CRA was revoking the charitable status of Tamil (Sri Lanka) Refugee-Aid Society of Ottawa (“Tamil”).³⁶ Status was revoked for, among other reasons, providing funding to non-qualified donees outside of Canada. In particular, Tamil was found to have provided funds to an organization which was believed by CRA to be operating as part of the support network for the LTTE. CRA stated that:

The Government of Canada has made it very clear that it will not tolerate the abuse of the registration system for charities to provide any means of support to terrorism, and that the tax advantages of charitable registration should not be extended to an organization where its resources may, directly or indirectly, provide any means

³⁵ *R v Thambathurai*, 2011 BCCA 137, [2011] B.C.J. No. 449, 302 B.C.A.C. 288 (BCCA).

³⁶ CRA News Release, “The Canada Revenue Agency revokes the charitable status of Tamil (Sri-Lanka) Refugee-Aid Society of Ottawa”, posted 17 July 2010, online: <<http://www.cra-arc.gc.ca/nwsrm/rlss/2010/m07/nr100717-eng.html>>.

of support for, or benefit to, an organization listed under the *United Nations Suppression of Terrorism Regulations* or the *Criminal Code of Canada*, or to any other body engaged in terrorism.

As such, it is evident that CRA is increasingly pursuing revocation or refusing charitable registration for organizations with purported ties to listed entities.³⁷

f) “Internationally Protected Persons,” “International Organizations,” and Political Protests

In addition to the amendments to the *Criminal Code* under the *Anti-terrorism Act*, the combined effect of part (a) of the definition of “terrorist activity” under the *Anti-terrorism Act* and the provisions of the *Foreign Missions Act* will impact political protesters, among others, and raises concerns about the further application of the “Super *Criminal Code*” provisions in instances of what may now be labelled as domestic terrorism. Charities and non-profit organizations should be particularly concerned about the expanded definition of the terms “international organization” and “internationally protected person” and the sweeping powers afforded to the RCMP contained within the part on “Security of Intergovernmental Conferences” in the *Foreign Missions Act*.

i) Interaction of Definitions

Under paragraph 83.01(1)(a) of the *Criminal Code*, as amended by the *Anti-terrorism Act*, the definition of “terrorist activities” includes actions taken against “internationally protected persons.” Section 2(1) of the *Foreign Missions Act* expands the definition of “international organization” to include “an inter-governmental conference in which two or more states participate.” In addition, the term “international organization” is expanded to include an “inter-governmental conference,” such as a meeting of the World Trade Organization (“WTO”) or the G20 in combination with section 2 of the *Criminal Code*, this extends the status of “internationally protected person,” to foreign representatives, including diplomats and other officials, possibly even low-level bureaucrats.

³⁷ See CRA’s website for the list of “Revoked Charities for Cause”, online: <<http://www.cra-arc.gc.ca/ebci/haip/srch/basicsearchresult-eng.action?s=revokedForCause&k=&b=true&ob=date&p=3#pageControl>>.

The means of transportation for, and the areas in which the “internationally protected persons” are to meet, are now protected under section 431 of the *Criminal Code*. The interaction between the expanded definitions contained within part (a) of the definition of “terrorist activity” in subsection 83.01(1) of the amendments to the *Criminal Code* and section 431 of the *Code* means that the definition of “terrorist activity” could include any threatening or commission of acts against such “internationally protected persons,” “official premises,” or “means of transport” that is likely to endanger the life or liberty of such persons. As a result, protestors blocking a road to a WTO Conference or a G20 Summit could run the risk of committing a “terrorist activity” where the road-block is such that it is likely to endanger the life or liberty of protected persons participating in the conference.

ii) Application to Protestors at Inter-Governmental Conferences

As well as expanding the definitions of “internationally protected persons” and “international organizations,” section 10.1 of the *Foreign Missions Act* provides the RCMP with the mandate to ensure the “proper functioning” of an “inter-governmental conference” and protection of “internationally protected persons.” Citing this legislation as authority, the RCMP established an “access control area” in downtown Calgary, nearly 100 km from the June 2002 G-8 Summit in Kananaskis. The RCMP established this “access control area” in anticipation of protests surrounding the G-8 Summit, claiming that it was not meant to affect “legitimate business in the area.”³⁸ In a notice published on the G8 Summit Security website entitled “Legal Information for Protesters,”³⁹ the RCMP advised that it would retain the authority to limit the *Charter*-guaranteed rights and freedoms of protestors when deemed necessary in order to ensure the “proper functioning” of the conference and the “protection of internationally protected persons.” It is apparent that the amended *Foreign Missions Act* is and will be used for the purpose of controlling political protest at the discretion of the RCMP.

³⁸ Royal Canadian Mounted Police, News Release, “Access Control Area to Be Established in Downtown Calgary” (21 June 2002), online: RCMP <www.g8summitsecurity.ca/g8/news/nr-02-04.htm> (This document is no longer available but was last accessed: 24 June 2002).

³⁹ This document is no longer available under the section “Information for Visitors” at www.g8summitsecurity.ca, but was accessed in June 2002.

Previous versions of the *Public Safety Act*, Bill C-55 and Bill C-42, proposed to amend the *National Defence Act* by giving the Minister of Defence power to proclaim a broad “military security zone” or “controlled access military zone.” Many feared, among other things, that this power could be used to subdue legitimate democratic dissent, a right that is guaranteed in the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). The *Public Safety Act* removed this provision in response to numerous concerns that were raised about the expansive powers it afforded to the government. Nevertheless, the government may still create limited access zones by using royal prerogative or by justifying its actions, as they did during the G-8 Summit, by referring to the duties imposed on law enforcement authorities under the *Foreign Missions Act*.

As the legislative guidelines for security and safety are re-drawn through the anti-terrorism legislation, charitable organizations will need to be careful that they do not violate anti-terrorism legislation in situations where their charitable activities lead them to assist individuals who may be exercising rights of political dissent. This should be of particular concern for charities that may become involved, even peripherally, in areas of potential controversy and confrontation, such as native rights, the environment, animal rights, and the pro-life/abortion debate. For example, a church organizes a two week prayer vigil in front of a private abortion clinic in hopes that there will be fewer abortions taking place at the clinic. Clients of the clinic complain that they cannot access services because of fear of intimidation from members of the vigil, even if participants do not utter threats. The owners of the abortion clinic are also upset because they have lost revenue during the vigil. A church in this example may be found to have violated aspects of the “*Super Criminal Code*.”

As well, charities, such as hospitals, that might provide medical assistance, or churches that might offer accommodation or other forms of assistance to protestors who infringe on a zone that has been designated limited access or interfere in a meeting that qualifies as an “international organization” will need to be aware of the consequences that could result from aiding or facilitating protestors in these

situations. Similarly, Canadian charities that are involved in humanitarian, social justice, or civil libertarian issues and participate in public rallies or demonstrations may also unwittingly be violating aspects of the “*Super Criminal Code*”.

2. Practical Implications for Charities

Whether or not a particular charity will be subject to prosecution under the “*Super Criminal Code*” provisions provided for under the *Anti-terrorism Act* remains speculative at this time, as only individuals have been prosecuted to date. The immediate practical concern for charities is not that they will be prosecuted under these provisions, but that they may be vulnerable to loss of charitable status under the CRSIA or under CRA’s broad powers under the *Income Tax Act* (Canada) (“ITA”). This could happen where a charity may have become unwittingly involved in activities or with groups that meet the definition of “terrorist activity” or “terrorist group” under the *Criminal Code*, even if no criminal charges are brought against the charity. A charity may also find that it meets the broad and inclusive definition of “facilitating terrorist activity” or “terrorist group” or even possible inclusion as a “listed entity” under the *Anti-terrorism Act*, which could result in the seizure, freezing, restraint and forfeiture of its charitable assets. Directors of charities could also face fines, penalties, and even imprisonment.

a) Specific Criminal Code Offences that Could Impact Charities

In recognition of the complexities of the anti-terrorism legislation, the co-ordination of several federal Acts and the lack of evidence to date concerning how the legislation may be implemented because of its relative novelty and the fact that much of the enforcement of these Acts is and will be conducted in secrecy, it is difficult to speculate concerning what sections of the amended *Criminal Code* will in fact affect charities. The most that can be done is to draw a few examples from the applicable *Criminal Code* provisions as amended by the *Anti-terrorism Act* where charities might be caught under those provisions. In this regard, some of the relevant *Criminal Code* provisions that could impact charities include the following:

- s. 83.02: Directly or indirectly providing or collecting property that is intended to be used or knowing that it will be used in whole or in part in a terrorist activity;

- s. 83.03: Directly or indirectly providing or inviting the provision of property, financial or other related services that facilitate or carry out a terrorist activity or benefits a terrorist group;
- s. 83.04: Directly or indirectly using or possessing property to facilitate a terrorist activity;
- s. 83.08: Dealing with property owned or controlled by or on behalf of a terrorist group, facilitating, directly or indirectly, transactions or financial or related services for the benefit or at the direction of a terrorist group;
- s. 83.18: Directly or indirectly participating or contributing to any actions that enhance the facilitation of a terrorist activity;
- s. 83.21: Directly or indirectly instructing a person to carry out activities for the benefit of or enhancing the ability of a terrorist group;
- s. 83.22: Directly or indirectly instructing a person to carry out a terrorist activity; and,
- s. 83.14: The Attorney General may apply for an order of forfeiture of property of a terrorist group if property had or will be used, in whole or in part, to facilitate or carry out a terrorist activity.

The interaction between the *Criminal Code* provisions amended by the *Anti-terrorism Act*, the *Foreign Missions Act*, and the *Public Safety Act* could lead to charities unwittingly violating the *Criminal Code*. Even if charities are not involved directly in engaging in terrorist activity, they could be involved in “facilitating terrorist activity” or a “terrorist group.” As such, any charitable organization considering providing humanitarian aid or assistance to individuals or groups in circumstances such as those described above need to be aware that they could be involved in violating the *Criminal Code* as amended by the *Anti-terrorism Act*.

b) Consequences of *Criminal Code* Offences

A charity that is found to be in violation of the *Criminal Code* provisions applicable to terrorism could face consequences on many fronts. Not only might the charity be subject

to the relevant penalties under the *Criminal Code* and inclusion as a “listed entity” but it could also be subject to possible loss of charitable status under the CRSIA or the ITA, as well as the freezing, seizure, restraint, and forfeiture of its charitable property.

i) *Criminal Code* Offences

The *Criminal Code* offences carry heavy penalties and directors of charities could also face fines, penalties, and even imprisonment if the charity is found to be engaged in terrorist-related activities. For example, the financing of terrorism is an indictable offence, carrying a maximum sentence of ten years which could apply to directors of a charity if found guilty of this offence.⁴⁰ Dealing in property or assets that have been frozen as belonging to a “terrorist group” could lead, on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or to both, or on indictment, to imprisonment for a term of not more than ten years.⁴¹ Facilitating a “terrorist activity” is an indictable offence with a maximum penalty of imprisonment for a term not exceeding fourteen years.⁴²

ii) Inclusion as a “Listed Entity”

While the *Criminal Code* provisions apply to charities, a further concern for charities lies in the latent potential that they could conceivably be included as a “listed entity” under section 83.05 of the *Criminal Code*. Specifically, this section authorizes the Governor in Council to:

[...] establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

⁴⁰ *Supra* note 2 at s 83.02-83.04.

⁴¹ *Ibid* at s 83.12(1).

⁴² *Ibid* at s 83.19(1).

The list was last updated on August 24, 2011 expanding the list to include 44 organizations.⁴³ Nevertheless, it should not be taken for granted that a charity could not find its way onto the list. The procedure for being placed on or removed from the list is set out in sections 83.05-83.07 of the *Anti-terrorism Act* and is very similar to that used in the charities de-registration process, which is discussed later in this paper. However, the listing process is even more problematic, since there is no notification or automatic quasi-judicial review process for a decision to list an entity. This puts the onus on organizations to review the list in order to determine if they are on it and to apply to be removed if they are found to be included in a case of mistaken identity. Each charity must also review the list regularly to ensure that it is not dealing, or has not dealt in the past, with an organization that is a “listed entity.”

There is also a separate United Nations list of terrorist organizations, the assets of which Canada is obligated to freeze under UN Security Council Resolutions 1267 and 1390. An entity that is not on Canada’s anti-terrorism list could still find itself in effectively the same position if a foreign government requested that the United Nations place it on the U.N. list. Moreover, the U.N. list applies to individuals as well as to entities. In this regard, Canada maintains a separate list of U.N.-listed organizations under the *United Nations Suppression of Terrorism Regulations* pursuant to the *United Nations Act*.⁴⁴ As changes are made to the U.N. list, organizations and individuals are automatically added or removed from the corresponding Canadian list through amendments to the regulations.⁴⁵ This separate U.N. list of terrorist organizations should be of particular concern to organizations that work in, or have contacts in, areas of conflict.

⁴³ Public Safety Canada, “Currently listed entities”, online: <<http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>>. The list must be reviewed every two years to determine whether there are still reasonable grounds for an entity to be a “listed entity”.

⁴⁴ *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, (SOR/2001-360), online: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2001-360/page-6.html#h-12>>.

⁴⁵ The List of Names subject to the *Regulations Establishing a List of Entities* made under subsection 83.05(1) of the *Criminal Code* and/or the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism (RIUNRST)* and/or *United Nations Al-Qaida and Taliban Regulations (UNAQTR)* is available from the Office of the Superintendent of Financial Institutions (OSFI) website, online: <http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?ArticleID=524> and is divided into “Names of Entities” and “Names of Individuals”.

iii) Freezing or Seizure of Assets

The potential consequences of being listed or meeting the definition of a “terrorist group” are grave. Under section 83.08 of the *Criminal Code*, the assets of all “terrorist groups” can be frozen. No person in Canada or Canadians overseas may, either directly or indirectly, deal with any property of a “terrorist group” or facilitate any transactions regarding such property or provide any financial services in relation to such property. Under sections 83.13 and 83.14, a judge may make an order for the seizure or forfeiture of property that is owned or controlled by or on behalf of a “terrorist group” or that has been or will be used, in whole or in part, to “facilitate” a “terrorist activity.”

These provisions could mean that if a charity was found to be a “terrorist group,” either by being listed or by virtue of “facilitating terrorist activity,” its charitable assets could be subject to seizure and forfeiture by the government. Likewise, if the charity accepted a donation from a “terrorist group,” its assets could also be subject to forfeiture for dealing with frozen assets. The judge would then make an order for the disposal of the assets. This in turn could expose the directors to civil liability for breach of their fiduciary duties to protect and preserve the charitable assets of the charity. Similar consequences could follow for the directors and the charitable assets of a charity from de-registration of the charitable status. For a discussion of the de-registration process and its implications for charities, see the De-registration under the *Charities Registration (Security Information) Act* section of this paper.

D. PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in 2000. It was originally enacted to combat organized crime in furtherance of Canada’s international obligations (particularly its commitments to the FATF) but, after the events of September 11, it was amended again through Part IV of the *Anti-terrorism Act*, which expanded

its scope to include terrorist financing. The amended *Act* was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“*Proceeds of Crime Act*”).⁴⁶

Canada’s terrorist financing laws will clearly have a significant impact on Canadian charities, as well as lawyers who are involved in advising charities. Under these provisions, charities may be subject to the prescribed record keeping and reporting duties outlined in the *Proceeds of Crime Act* and its various Regulations.⁴⁷ These duties have been referred to as a new compliance regime for financial entities, the definition of which may well include charities. However, even if charities do not fall within the definition of a reporting entity, charities could still be subject to reporting by other reporting entities, such as a bank, an accountant or life insurance company, without the charity’s knowledge.

Even where lawyers or their charitable clients are not themselves subject to a duty to report, the process of being subject to the monitoring of financial transactions under the *Proceeds of Crime Act* for the purposes of detecting criminal behaviour will likely involve intrusive monitoring of the financial activities of otherwise innocent charities and organizations that deal with them. The amendments to the *Proceeds of Crime Act* brought about by both the *Anti-terrorism Act* and the *Public Safety Act* mean that charities, their fundraisers and their legal counsel may be drawn into the ambit of the *Act*, possibly as entities required to report, in addition to being the subjects of such reports.

The expansion of the federal government’s power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) and shared with various government and law enforcement agencies could lead to any of the consequences affecting a charity, including investigation, criminal charges, becoming a “listed entity”, de-registration, as well as the freezing and seizing of assets.

⁴⁶ *Proceeds of Crime (Money Laundering) Act*, SC 2000, c 17 [*Proceeds of Crime Act*]. For an in-depth discussion of the Act, see Alison Manzer, *A Guide to Canadian Money Laundering Legislation* (Markham: Butterworths, 2002) [Manzer].

⁴⁷ For a list of these Regulations, see: <http://laws-lois.justice.gc.ca/eng/acts/P-24.501/>.

1. Bill C-25, an Act to amend the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*⁴⁸

Bill C-25, which received Royal Assent on December 14, 2006, represented a poignant example of the concerted effort to increase the monitoring and oversight of the charitable sector and will have a significantly negative impact on charities that transfer funds internationally. With Bill C-25's expansion of reporting entities, virtually any means of transmitting funds (i.e. banks, money order businesses, securities dealers) used by a charity may result in reports being made to FINTRAC. The *Proceeds of Crime Act* refers to this information, which is retained for up to five years, as "designated information" and which may potentially be disclosed to both foreign and domestic government agencies. Most pertinent to charities that transfer funds domestically and internationally is Bill C-25's expansion of designated information to include "the name, address, electronic mail address and telephone number of each partner, director or officer" of the charity and "any other similar identifying information." As such, a charity's directors and officers are now explicitly central to the anti-terrorism vetting that is being carried out by private sector financial service providers and government agencies.

In addition, under section 65(1) of the *Proceeds of Crime Act*, as amended by Bill C-25, FINTRAC is specifically authorized to enter into agreements with foreign governments in order that FINTRAC may send and receive designated information between foreign agencies. The reports detailing "suspicious" transactions that are sent to FINTRAC and passed on to various government agencies could have potentially disastrous consequences for a charity. These reports could be the basis for "facilitation" of terrorism charges under section 83.19 of the *Criminal Code*; potentially initiate the de-registration process under the CRSIA; or even result in personal liability for the directors and officers of a charity. Even an initiation of an investigation under anti-terrorism provisions could lead to seizure or freezing of charitable property and immeasurable damage to public perception and donor confidence.

What raises the spectre of being investigated under suspicions of contravening anti-terrorism legislation is not only the expansion of the information being collected and retained by

⁴⁸ *Supra* note 7.

FINTRAC, but the burgeoning domestic and foreign sources to which this information is being disclosed. For example, the grounds to disclose information to CRA have become very broad under the Bill C-25 amendments. Under section 55 of the *Proceeds of Crime Act*, the “designated information” would be disclosed to CRA if there were grounds to even “suspect” that the information is relevant to maintaining its charitable status. Under the Bill C-25 amendments, the expanded designated information could also be disclosed to the Canada Border Services Agency, the Canadian Security Intelligence Service (“CSIS”), Communications Security Establishment and the RCMP.

2. Impact of the *Proceeds of Crime Act* and Regulations on Charities

a) Information Gathering under the *Proceeds of Crime Act*

The expansion of the federal government’s power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by FINTRAC and shared with various government and law enforcement agencies could lead to any of the consequences affecting a charity including investigation, criminal charges, becoming a “listed entity”, de-registration, as well as the freezing and seizing of assets.

In this regard, a charity that funds international programs may unwittingly become the subject matter of a reported transaction without even being aware of it. For example, a charity’s bank or its accountants may now either individually or collectively be required by law to report to FINTRAC any suspicious transactions, large cash transactions, or cross border transactions of the charity as specified in the legislation and regulations. Moreover, such reporting entities are specifically enjoined from letting the organization know, either directly or by implication, that they have been made the subject of a report.⁴⁹ On the other hand, if FINTRAC suspects terrorist financing or money laundering activity based on its analysis of the reports it receives, it may release the reported information to law enforcement and other government agencies. Based on this information, government

⁴⁹ *Proceeds of Crime Act*, *supra* note 46 at s 8; see also Manzer, *supra* note 46 at 10-11 regarding the difficulties this creates for reporting entities. Essentially, the implications are that reporting entities are required to obtain detailed information for all transactions, not only reported transactions, in order not to tip a client off about an intended report.

agencies may take action to investigate the subject transactions, retain and search the subject persons, lay charges, and seize the property in question for forfeiture.

The information reported to FINTRAC can also affect charities through the broad powers granted under Part VI of the *Anti-terrorism Act* (which is the CRSIA) to the Solicitor General and the Minister of National Revenue. Information collected by FINTRAC may be made available to, and used by, the Solicitor General and the Minister of National Revenue in considering whether to revoke an organization's charitable status or to deny a charitable status application.

The reporting requirements may also have an impact on charitable fundraising involving any large cash donations or the funding of international projects. This may unduly deter *bona fide* donors from making significant donations to Canadian charities, especially organizations that the donors are not intimately familiar with, or discourage Canadian charities from transferring much-needed funds to support projects in foreign jurisdictions. A Canadian charity that transfers charitable funds to a foreign charity under an agency or joint-venture agreement may find itself becoming the subject of a reported transaction to FINTRAC.

b) Reporting Requirements under the *Proceeds of Crime Act*

The reporting requirements included in the amendments under the *Proceeds of Crime Act* may also impact charities to the extent that some charities involved in certain activities may be found to fall within the definition of entities that are required to report under the Act. This may occur indirectly under paragraph 5(g) of the *Proceeds of Crime Act*, as amended by Bill C-25, which states that persons and entities “authorized under provincial legislation to engage in the business of dealing in securities” have a statutory obligation to record and report the financial transactions. Paragraph 5(g) could apply to charities by virtue of the fact that charities in Ontario for example, are exempted from the requirements for registration under the *Securities Act*⁵⁰ and therefore could, in some situations, be considered to be “*authorized* to engage in the business of dealing in

⁵⁰ *Securities Act*, RSO 1990, c S5.

securities” under the revised section 5(g) in Bill C-25, whether or not they in fact engage in said activities.

In this regard, according to paragraph 2.38(1) of the National Instrument 45-102(“NI 45-102”)⁵¹ dealer registration under provincial securities legislation would not be required with respect to a trade in securities by an issuer:

that is organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit in a security of its own issue if

- (a) no part of the net earnings benefit any security holder of the issuer, and*
- (b) no commission or other remuneration is paid in connection with the sale of the security.*

In Ontario, where a charity fulfills the exemption requirements under paragraph 2.38(1) of NI 45-102 and becomes involved in a related business of issuing securities for a profit, such as the issuance of bonds by a church denomination at a low interest rate in order to reinvest the monies received in market securities or in loans to member congregations at a higher interest rate, may have become both “authorized” and “engaged” in the business of dealing in securities for the purposes of paragraph 5(g), referred to above. If so, it might become subject to the mandatory recording and reporting obligations of the *Proceeds of Crime Act*. This could also happen in other provinces with similar securities legislation.

Charities may also be included within the expanded definition of reporting entities set out in the regulations under the *Proceeds of Crime Act*, as amended by Bill C-25. The regulations now include definitions of “financial entity,” which in some situations may include charities. Specifically, the regulations state that a “financial entity” includes “a company to which the *Trust and Loan Companies Act* applies.” In this regard, where a

⁵¹ National Instrument 45-106 *Prospectus and Registration Exemptions* [“NI 45-106”] was adopted on September 14, 2005 by the Canadian Securities Administrators (CSA), which represent the securities regulators of each Canadian province and territory. NI 45-106 came into effect either as a rule, a policy, or a regulation, in all CSA jurisdictions, except Yukon, on September 14, 2005. NI 45-106 harmonizes and consolidates many of the exemptions from the prospectus and registration requirements previously contained in provincial statutes, and national, multilateral and local instruments.

national charity incorporated by a special act of Parliament or under the *Canada Corporations Act* receives monies from other charities in order to pool those monies for investment purposes, the receiving charity might be involved in trust activities that could require it to be registered under the federal *Trust and Loan Companies Act*. If so, then the charity would have become a reporting entity for the purposes of the *Proceeds of Crime Act*.

E. DE-REGISTRATION UNDER THE *CHARITIES REGISTRATION (SECURITY INFORMATION) ACT*

1. The Process: *Charities Registration (Security Information) Act*

Part VI of the *Anti-terrorism Act* enacted the CRSIA.⁵² This Act enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Such de-registration is initiated by the issuance of a “certificate” against the charity or applicant for charitable status and could have consequences beyond simple de-registration for the charitable organization.

a) Grounds for the Issuance of a Certificate

Under subsection 4(1) of the CRSIA, a certificate can be issued against an existing charitable organization or an applicant for charitable status where there are “reasonable grounds” to believe the organization has made, makes or will make resources available, directly or indirectly, to an entity that has engaged or will engage in a “terrorist activity” as defined in subsection 83.01(1) of the *Criminal Code*. The process is initiated by the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue who, if reasonable grounds are found, jointly sign the certificate. However, the *Act* does not define “reasonable grounds” nor does it give examples of the kinds of factors that could be considered reasonable grounds.

⁵² *Supra* note 4.

b) Judicial Consideration of the Certificate

The judicial consideration stage of the de-registration process under section 5 is meant to address the issue of procedural fairness and to give the charity an opportunity to respond to the claims made against it.

The charity must be served notice of the issuance of a certificate as soon as it has been signed by the Ministers. A minimum of seven days after the charity has been served, the certificate must be submitted to a judge of the Federal Court for a determination of its reasonableness. The charity is then given the opportunity to respond to the issuance of the certificate. During the judicial consideration stage of the process, the judge must give the charity or applicant for charitable status a summary of the grounds that gave rise to the issuance of the certificate. This summary is comprised of security and criminal intelligence information that, in the judge's opinion, may be disclosed under the *Act*.

c) Evidence

Section 6(j) of the CRSIA states that "anything that ... is reliable and appropriate" may be admitted into consideration by a Federal Court judge "even if it is inadmissible in a court of law." The determination of the reasonableness of the certificate would be based in part upon this broad base of information available to the court for its consideration. This should be of concern to charities since it means that, despite the serious consequences of a certificate, this section effectively waives the ordinary rules governing the admissibility of evidence for the purposes of the Federal Court review of the certificate.

Another provision within the CRSIA that raises concerns about the fairness of the process is paragraph 6(e) which also deals with evidence to be considered by the Federal Court judge. Section 3 defines "information" as "security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of such a government or organization." Paragraph 6(e) states that "on each request of the Minister [of Public Safety and Emergency Preparedness] or the Minister of National Revenue, the judge shall hear all or part of the information or evidence in the

absence of the applicant or registered charity named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person.” This evidence can be relied upon in determining the reasonableness of the certificate by the Federal Court judge, even though it may not be disclosed to the charity in question by virtue of paragraph 6(g) which states that “the information or evidence described in paragraph (e) shall not be included in the summary but may be considered by the judge in determining whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or endanger the safety of any person.”

Furthermore, the judge is to decide on the relevance of such information after hearing arguments from the Minister seeking to include it. The charity is not given an opportunity to argue the relevance of such evidence or cross-examine it to challenge its credibility. However, even if it were granted the opportunity, the charity could not argue the relevance or credibility of evidence to which it has no access. Whether the information is ultimately relied upon or not, the determination takes place entirely in the absence of the charity or its legal counsel.

Paragraph 6(b) of the CRSIA grants the judge considering the certificate discretionary power to decide whether any information should not be disclosed to the applicant or registered charity or any legal counsel representing it because the “disclosure would be injurious to national security or endanger the safety of any person.” Combined with the possible exclusion of foreign or government evidence, this raises the possibility that much of the security information and intelligence reports considered by a Federal Court judge might be deemed too sensitive to disclose to the affected charity. In fact, it is altogether possible for a charity to be de-registered based entirely on information to which it has no access.

d) Effect of Certificate

After a Federal Court judge has determined that a certificate is reasonable, the Ministers must publish the certificate in the *Canada Gazette*. Once it is published, the charity is stripped of its charitable status. The certificate is effective for seven years, as per section

13, after which the Ministers would have to start the process over again if they feel the organization is still a risk. However, by that time the charity would not likely be still in existence or would have little support. An application can be filed under section 10 for a review of the certificate, based upon a material change in circumstances since the determination was made in order to have the certificate cancelled earlier than the seven year period.

e) Appeal

Finally, after a certificate is issued, subsection 11(5) of the CRSIA precludes any avenue for judicial appeal or review, other than a limited right to apply to the Ministers to review the certificate under section 10, described above. However, considering that a charity might not even know what information the certificate was based on in the first place, it would be very difficult for it to know when its circumstances might have changed materially. In any event, once a charity has been de-registered, it is highly unlikely any organizational infrastructure or support base would remain to launch an application to reconsider the certificate for a material change in circumstance.

f) Concerns about the De-Registration Process

The certificate and de-registration process raises several concerns from the point of view of basic principles of natural justice and due process. These factors are of even greater concern in light of the serious consequences of the issuance of the certificate. De-registration not only entails a charity losing its ability to enjoy the tax benefits of charitable status, but there is also a possibility that the issuance of a certificate might expose the charity or its directors to investigation and prosecution under the enhanced “*Super Criminal Code*” provisions. More important from a practical standpoint, however, is the strong possibility that issuance of a certificate could lead to the freezing or seizure of the charity’s assets under sections 83.08 or 83.13-83.14 of the *Criminal Code*. This could entail the bankruptcy, insolvency, or winding up of the charity and, in turn, expose the charity’s directors to civil liability at common law for breach of their fiduciary duties by not adequately protecting the assets of the charity.

The lack of procedural safeguards available to a charity subject to de-registration is of serious concern in light of these potentially severe consequences to a charity and its directors. Some specific concerns about the process and issuance of a certificate include the following:

- No knowledge or intent is required;
- The provision is retroactive - past, present and future actions can be considered;
- Normal rules for the admissibility of evidence do not apply;
- “Confidential” information considered may not be disclosed to the charity, even if it was relied upon in making the determination of reasonableness, which may severely handicap the ability of the charity to present a competent defence;
- No warning is issued or opportunity given to the charity to change its practices;
- There is no ability for appeal or review by any Court;
- The justification for the certificate is based on the low standard of “reasonable belief”; and
- The burden of proof is shifted, requiring the charity to respond and prove its innocence, even where it may not really know what the charges are against it.

During the judicial consideration of the certificate, the charity is given the opportunity to respond. However, because of the limitations on disclosure of information to the charity, a charity’s knowledge of the case against it and its ability to respond may be severely limited. The effect of these limitations will, in essence, impose a burden of proof on the charity that it cannot meet. The “reasonability” of a certificate under these circumstances may effectively be a foregone conclusion. This concern is borne out by experience under similar provisions in the *Immigration and Refugee Protection Act* that have been in force for many years, which indicate Federal Court judges usually endorse security certificates.⁵³

If the certificate is found to be reasonable by the Federal Court judge, then the certificate is valid for seven years, during which time a registered charity is stripped of its charitable status or an applicant for charitable status is ineligible to obtain charitable status. Given

⁵³ Colin Freeze, “Powerful antiterror tool rarely employed by Ottawa”, *The Globe and Mail* (30 October 2002) A9.

that there is no right to appeal a certificate, that the ordinary rules of evidence have been waived, and that evidence deemed to be injurious to national security or a person's safety is not to be disclosed to the charity, it is difficult to see how the de-registration process could be considered fair, notwithstanding CRA's recent suggestion to the contrary.⁵⁴

F. A REVIEW OF ANTI-TERRORISM LEGISLATION IN CANADA: THE AIR INDIA REPORT

1. Background

On June 23, 1985, Air India Flight 182, which originated in Canada, blew up over the Atlantic Ocean south of Ireland, killing all 329 people on board, 280 of which were Canadians. Air India Flight 182 remains the worst terrorist attack in Canadian history.⁵⁵ Evidence recovered from the site revealed that a bomb located in the rear cargo hold of the aircraft had detonated and opened a hole in the left aft fuselage of the aircraft.⁵⁶

More than twenty years after the Air India bombing, two Sikh separatists were charged with 329 counts of first-degree murder, conspiracy to commit murder, in addition to other related charges. After a two-year trial, the two men were found not guilty on all counts.⁵⁷ Subsequent to the trial, the Governor General in Council, on the recommendation of Prime Minister Stephen Harper, appointed former Supreme Court of Canada Justice John Major to conduct a commission of inquiry into the bombing of Air India Flight 182 (the "Commission"). The Governor-in-Council charged the Commission with lengthy terms of reference, which included the specific purpose of making findings and recommendations.⁵⁸ The relevant issue in terms of anti-terrorism legislation in Canada was whether Canada's existing legal

⁵⁴ Canada Revenue Agency, "The New Anti-terrorism Law: Impact on Charities", *Registered Charities Newsletter* (Spring 2002 – No.12), online: CRA < http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-12/news12-e.html#P15_2557 >. See also Terrance S. Carter & Sean S. Carter, "Recent CCRA Newsletter Addresses Impact of Anti-Terrorism Legislation", *Charity Law Bulletin No. 16* (20 September 2002), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2002/chylb16.pdf>>.

⁵⁵ Prime Minister of Canada Stephen Harper, "Final Report on the Commission of Inquiry into the Investigation of the bombing of Air India flight tabled", (17 June 2010), online: <<http://www.pm.gc.ca/eng/media.asp?category=1&featureId=6&pageId=26&id=3448>>.

⁵⁶ Public Safety Canada, "Foreword: Lessons to be learned: The report by the Honourable Bob Rae", online: <<http://www.publicsafety.gc.ca/prg/ns/ai182/rep1-for-eng.aspx>>.

⁵⁷ CBC News, "In-Depth - Air India Timeline: The Trial", online: <<http://www.cbc.ca/news/background/airindia/timeline.html>>.

⁵⁸ For the complete terms of reference see online: <<http://pm.gc.ca/eng/media.asp?id=1145>>.

framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations.

During the inquiry process, thousands of documents were submitted and hundreds of witnesses appeared before the Commission to give testimony, including the author, together with a written submission to the Commission, entitled *The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance* (“the Submission”).⁵⁹ In June 2010, Commissioner Major released the Commission’s final report, entitled the *Air India Flight 182: A Canadian Tragedy* (the “Report”),⁶⁰ which consists of five volumes and deals with all aspects of the Canadian bombing.

2. Volume 5 of the Air India Report

Volume 5 of the Report deals specifically with terrorist financing and offers a thorough examination of the impact of terrorist financing and Canada’s role in combating such terrorist activity.⁶¹ The Submission, which is mentioned throughout Chapter VI in Volume 5, relates to charities and the danger of utilizing broad terminology adopted by the Criminal Code, as such terms have the potential of defining innocent charitable activity as terrorism or as facilitating terrorism. The Submission included recommendations, such as the need for a *mens rea* requirement, due diligence defence and appeal options in the CRSIA.⁶²

The topics examined in this Report included a review of charities’ role in terrorist financing through an examination of the process of sharing intelligence amongst Canadian agencies, the CRA’s use of intermediate sanctions, the CRSIA process, terrorism provisions in the *Criminal Code*, and methods of avoiding harm to legitimate charities. There was also an examination of the international structure involved in fighting terrorist financing. This Report recognized that measures to defeat the use of charities for terrorist financing should not

⁵⁹ Terrance S. Carter, “The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance”, (26 October 2007), online: <<http://www.carters.ca/pub/article/charity/2007/tsc1026.pdf>>.

⁶⁰ Commissioner John C. Major, “Air India Flight 182: A Canadian Tragedy”, (17 June 2010), online: Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

<http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm>.

⁶¹ *Ibid.*

⁶² *Supra* note 59 at 55.

unnecessarily impede the valuable activities of legitimate organizations, and the work of honest charities should not be hindered by unrealistic guidelines or best practices. The Submission was quoted in Volume 5 in regard to the overreaching effect of the current system's approach to fighting terrorist financing in the charitable sector:

“[W]hile Canada’s anti-terrorism legislation is very much a product of a complex array of international initiatives, conventions and multilateral agreements that establish daunting requirements for charities, these same international requirements at least acknowledge the need to strike a balance between efforts to thwart terrorist financing and ensuring that legitimate charitable programs can continue to operate. Specifically, the Financial Action Task Force (“FATF”), in a key policy document concerning the oversight of the non-profit organizations sector internationally, reminds its member countries to ensure that “(m)asures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities” and also that those measures “should to the extent reasonably possible avoid any negative impact on innocent and legitimate beneficiaries of charitable activity”.⁶³

The Report also recognized the charitable sector as an important participant that needs to be consulted when considering Canada’s role in suppressing terrorist financing in the future.

3. Performance Indicators for Canada’s Anti-terrorist Financing

The Report noted that there is a shortage of evidence that the anti-terrorist financing program has produced concrete results.⁶⁴ In this regard, federal government officials stressed the difficulty of doing performance assessments about activities that involve preventing some future event or deterring crime and the Report recognized that accurately evaluating a system to combat a covert phenomenon is invariably difficult. Nonetheless, the Report suggested

⁶³ *Supra* note 60 at Volume 5, Chapter VI, p 229.

⁶⁴ *Supra* note 60 at Volume 5, Chapter VII, p 239.

that more comprehensive statistics would give a better understanding of the anti-terrorist financing program and facilitate regular international and domestic assessments of its performance.

On a related note, a review of Anti-terrorist legislation is not only a concern for Canada. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament passed a draft resolution July 12, 2011 calling for a full assessment of the cost, effectiveness and impact on civil liberties of post-9/11 counter-terrorism measures that have been taken in the European Union. Members of the European Parliament (MEPs) urged that counter-terrorism policies match terrorist threat levels and that measures taken must be based on evidence, not merely on assumptions, and meet standards of necessity, effectiveness, proportionality, civil liberties, the rule of law and democratic scrutiny and accountability. The draft resolution calls for an in-depth and complete evaluation of the current European counter-terrorism measures in hopes of leading to more efficient policies. The Committee (which is a standing committee of the European Parliament for the areas of freedom, security and justice) called on the European Commission (the executive body of the European Union which operates as a cabinet government responsible for proposing legislation, implementing decisions, etc.) to examine all existing counter-terrorism policies both in Europe and nationally, provide a detailed report on all EU funds currently being used for counter-terrorism purposes, develop a uniform set of standards for protecting and supporting victims and witnesses, create a proposal for data use and protection legislation, and develop anti-racism and anti-discrimination policies.⁶⁵ The European Parliament, however, has postponed the vote on the draft resolution and has sent it back to the Committee to be re-examined. Parliament is asking for more time to build a stronger position on the issue.⁶⁶

⁶⁵ European Parliament, Press Release (13 July 2011), online:

<<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20110711IPR23776&language=EN>>.

⁶⁶ European Parliament, Press Release (13 September 2011), online:

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20110913IPR26457+0+DOC+XML+V0//EN&language=EN>>.

G. EFFECTS FELT AROUND THE WORLD

The global reach of Canadian charities, in terms of both charitable activities and potential donors, means that such organizations and their advisors must look beyond domestic anti-terror policies and consider the implications of initiatives of foreign jurisdictions. Charities working in foreign countries will have to be in compliance with both domestic and foreign laws. At the same time, those organizations may find themselves subject to increased donor scrutiny in order that the donors may satisfy themselves that they are in compliance with their own country's laws. In reality, it is not just charities in Canada that feel the effects of anti-terrorism legislation; a ripple effect can and is felt around the world.

The Center for Human Rights and Global Justice published a report on July 18, 2011 that studied the effects of the U.S. Government's counter-terrorism policies domestically and abroad on women and sexual minorities around the world. The report, *A Decade Lost: Locating Gender in U.S. Counter-Terrorism*, examined on a comprehensive basis "how the gender features and impacts of the USG's [U.S. Government's] counter-terrorism efforts relate to gendered patterns in failures to protect women and LGBTI [Lesbian, Gay, Bisexual, Transgender, Intersex] communities against terrorist violence."⁶⁷ The report brought attention to the differential impacts of counter-terrorism on women, men, and sexual minorities, and the ways in which such measures use and affect stereotypes which hampers both counter-terrorism and equality goals. Among its key findings was that development assistance for reducing violent extremism in young men is leaving women behind; anti-terrorist finance laws prevent critical resources from reaching women and sexual minorities; immigration bars are re-victimizing victims of trafficking, terrorism and anti-gay violence in Iraq; and securing the government's relationship with Muslim communities is making women in these communities unsafe. The report's recommendations call on the Obama Administration to make public its first-ever policy on the role of development in countering violent extremism and release its new policy on engaging with communities in the United States to prevent extremism.

⁶⁷ Center for Human Rights and Global Justice, "A Decade Lost: Locating Gender in U.S. Counter-Terrorism", (New York: NYU School of Law, 2011), online: <<http://www.chrgj.org/projects/docs/locatinggender.pdf>> at 10.

Recent legislative developments in the United States (“U.S.”) have extended the controversial provisions of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act) (the “Patriot Act”).⁶⁸ President Barack Obama signed a four-year extension of three controversial provisions: (1) roving wiretaps, (2) searches of business records, and (3) conducting surveillance of “lone wolves” — individuals suspected of terrorist-related activities not linked to terrorist groups. The extension of the three controversial provisions without the introduction of any new civil liberty protections and the continued classified nature of the official government interpretation of the Patriot Act will have far-reaching implications for both U.S. and counterpart Canadian charities working in conflict zones as U.S. anti-terror laws can extend their application to non-U.S. residents and to events that have not taken place in the U.S., by very tenuous threads including travel by individuals to or through the U.S.

Charities working in or through the U.S. will need to be aware of recent judicial developments in the U.S. Supreme Court’s decision on the material support of terrorism laws in *Holder v. Humanitarian Law Project*.⁶⁹ This case focused on the constitutionality of U.S. Code Section 2339B, which makes it a federal crime – punishable by up to 15 years in prison – to “knowingly provid[e] material support or resources to a foreign terrorist organization.”⁷⁰ The term “material support or resources” includes providing any property, service, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel and transportation, to a foreign terrorist organization. The court upheld the material support provision and found that in the text of the statute, the mental state required for a violation is knowledge about the organization’s connection to terrorism, not specifically intent to further the organization’s terrorist activities. As such, the Holder decision highlights a number of troubling issues with respect to the ability of charities to carry out programs in conflict zones that are intended to improve the lives of vulnerable persons, as lawful activities can be deemed unlawful simply because of the people

⁶⁸ *Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, 18 USC 1.

⁶⁹ *Holder v. Humanitarian Law Project*, 561 U. S. ____ (2010).

⁷⁰ United States Code, 18 USC Sec. 2339B, online: <<http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t17t20+1115+15++%282339B%29%20%20%20%20%20%20%20%20%20%20%20%20>>

who are participating in a charity's activities, namely alleged terrorists or terrorist sympathizers. The paucity of judicial interpretation of anti-terror laws is an additional concern, as the Holder decision, while a decision of the U.S. Supreme Court, may still hold judicial sway in Canadian regulatory and judicial proceedings, including those carried out by CRA.

Notwithstanding the reality of terrorist attacks, it must be questioned whether the pervasive view that the charitable sector represents the “crucial weak point”⁷¹ in the fight against terrorism is a relevant ongoing concern, an artefact of past abuses, or the unfortunate result of exaggerated claims based on flawed assumptions. Governments have put significant efforts into developing safeguards and restrictions on the charitable sector in the last decade, but the effect may have been to drive illicit activities underground and place a strain on the human, programmatic and financial resources of legitimate charities. For international relief organizations, like the International Red Cross, compliance with counterterrorism laws could force these aid organizations to have to violate their well-established standards of neutrality in their work, which may constitute a violation of the *Universal Declaration of Human Rights*,⁷² that guarantees non-discrimination in the delivery of services and benefits, and the *Geneva Conventions*, which demand the provision of aid to the population in occupied territories either by the State or by impartial humanitarian organizations. All contracting parties to the *Geneva Conventions*, which includes Canada, are required to “permit the free passage” of aid and “guarantee its protection.”⁷³ Failing to recognize that political or militant organizations will be pervasive and deeply ingrained in daily life in occupied territories and conflict zones, and as such impartial humanitarian organizations will by necessity be required to have contact with the political or militant organizations, is to ignore the collective obligations to international conventions and treaties, like the Geneva Conventions, during these humanitarian crises. The United Nations General Assembly took the position in 2010 that any measures taken by nations to prevent and

⁷¹ *Supra* note 1.

⁷² *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

⁷³ Geneva Convention, *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Geneva: Diplomatic Conference of Geneva of 1949), art 59.

combat terrorism “must fully comply with” human rights and international humanitarian law,⁷⁴ which includes the obligation to facilitate humanitarian assistance to vulnerable populations.

H. PROPOSED VICTIM LEGISLATION IN CANADA

Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe Streets and Communities Act)*, was introduced on September 20, 2011, and is now in Second Reading in the House of Commons. There are five parts to Bill C-10, and of particular interest is Part I which includes reforms to deter terrorism by amending the *State Immunity Act*. Part I is titled *Justice for Victims of Terrorism Act* and is enacted as “An Act to deter acts of terrorism against Canada and Canadians.” The purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters. Under section 4(1), any person who has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is punishable under the *Anti-terrorism Act*, may bring an action to recover an amount equal to the loss or damage proved to have been suffered by the person and obtain any additional amount that the court may allow, from any of the following:

- (a) any listed entity or other person that committed the act or omission that resulted in the loss or damage; or
- (b) a foreign state or listed entity or other person that — for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) — committed an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the Criminal Code.

Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, is the sponsor for Bill C-10 and opened the debate on Wednesday, September 21, 2011 with: “The bill, [...] fulfills the commitment in the June 2011 Speech from the Throne to quickly reintroduce law and

⁷⁴ *The United Nations Global Counter-Terrorism Strategy*, GA Res A/RES/64/297, UNGAOR, 64th Sess, UN Doc A/64/PV.117, (2010).

order legislation to combat crime and terrorism. This commitment, in turn, reflects the strong mandate that Canadians have given us to protect society and to hold criminals accountable.”⁷⁵

The bill has been introduced six times since 2005,⁷⁶ due to elections and prorogations where bills have died on the Order Paper. Bill C-10 amends approximately 15 Acts in this comprehensive piece of legislation and it is the Honourable Rob Nicholson’s “plan to pass it within the first 100 sitting days of Parliament.”⁷⁷

I. DUE DILIGENCE RESPONSE

1. The Need for Due Diligence

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable or tax exempt status under tax laws, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property. While due diligence is also not a defence for directors against anti-terrorism charges, the anti-terrorism laws do not abrogate directors’ fiduciary duties to the charity and its donors. As such, it can provide powerful protection for directors against complaints at common law. If a charity’s assets are frozen or seized, the charity’s directors and officers could be exposed to civil liability for breaching their fiduciary duty to protect the organization’s charitable assets. If they are found to have been negligent, this could be a very significant liability quite apart from any possible criminal sanctions. Directors and officers may be able to protect themselves against a finding of negligence by demonstrating their intent to comply through exercising due diligence.

On a more practical level, however, the greatest benefit from exercising due diligence may be in its preventative effect. While it may not provide a defence after the fact, when a violation has already occurred, it is one measure that a charity can use in advance to protect itself from

⁷⁵ *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (21 September 2011) at 1515 (Hon Rob Nicholson).

⁷⁶ C-367 (38-1); S-218 (39-1); S-225 (39-2); C-35 (40-2); S-7 (40-3); C-10 (41-1)

⁷⁷ *Supra* note 75.

unwittingly committing a violation. Due diligence can help avoid the occurrence of the kind of event or association that might lead a charity to be implicated under the anti-terrorism laws. By being more knowledgeable about the charity and its operations, officers will have more power to respond appropriately.

Through exercising due diligence the charity can identify potentially problematic individuals or organizations before it is too late. Due diligence can highlight programs that need to be restructured or discontinued in order to avoid exposure. It can alert officers to the need to decline donations from questionable donors. While no one can guarantee that due diligence will identify all possible risks, it can certainly help to minimize a charity's exposure by eliminating obvious risks.

2. Global Standards Required for Charities that Operate Internationally

a) Canada Revenue Agency

Due diligence procedures for charities that operate internationally are not only important as a response to Canada's anti-terrorism initiatives, but are the only prudent course of action in the face of emerging global standards concerning NGOs and charities. CRA's publication "Charities in the International Context"⁷⁸ stresses the importance of taking into account "Best Practice" guidelines that are promulgated by relevant international policy making institutions, such as the FATF, and by key jurisdictions, such as the United Kingdom and United States.⁷⁹ These "Best Practice" guidelines are reflective of an emerging global standard of due diligence procedures that are becoming accepted as the benchmark for international charitable operations.

In addition, it has become apparent that a charity need not have operations in one of the key jurisdictions spearheading the "war on terrorism" for their operations to be subject to monitoring by agencies of these key jurisdictions for compliance with their "Best

⁷⁸ Canada Revenue Agency, "Charities in the International Context", online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/ntrntnl-eng.html>>.

⁷⁹ For a further discussion of these issues please reference: Terrance S. Carter & Sean S. Carter, "Worldwide Implications of America's Emerging Policies Concerning NGOs, Nonprofits, and Charities", *Anti-terrorism and Charity Law Alert No. 5*, online: <<http://www.carters.ca/pub/alert/atcla/atcla05.pdf>>.

Practice” standards.⁸⁰ This is especially true for charities that operate in areas that may be considered a “conflict zone” by a particular jurisdiction, subjecting the charity to heightened levels of surveillance and monitoring. The consideration of international “Best Practice” guidelines is also important for charities that engage in cross-border funds transfers, work with international partners, or utilize foreign financial institutions, as they may be subject to the same type of scrutiny.

Furthermore, information collected during the monitoring of a charity’s operations by agencies of these key jurisdictions may well directly impact the charity, regardless of whether it is based or has operations in the jurisdiction that has conducted the investigation and monitoring. This is primarily due to the increased sharing between countries of information collected concerning non-profit organizations over the past few years. Information obtained by foreign jurisdictions that is shared with Canadian authorities may well be sufficient for Canada to launch its own investigations or processes under its anti-terrorism legislation. This may result in the commencement of preliminary procedures for the deregistration process under the CRSIA. Being aware of international “Best Practice” due diligence guidelines and demonstrating compliance with them by implementing due diligence procedures in the operations of a charity can help minimize such risks associated with operating internationally.

In this regard, CRA released a *Checklist for charities on avoiding terrorist abuse* in April 2009.⁸¹ The checklist comprised of a list of 11 questions for charities to ask themselves regarding areas of potential risk of abuse by terrorists or other criminals. This is certainly a step in the right direction for charities, but it lacks overall usefulness from a practical standpoint and raises some potential concerns:

1. It does not provide charities with an understanding of anti-terrorism legislation nor potential penalties;

⁸⁰ Department of the Treasury of the United States, “2007 National Money Laundering Strategy”, online: <<http://www.treas.gov/press/releases/docs/nmls.pdf>>.

⁸¹ Canada Revenue Agency, “Checklist for charities on avoiding terrorist abuse”, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html>>. For commentary on this checklist, see Terrance S. Carter & Nancy Claridge, “CRA’s New Anti-Terrorism Checklist – A Step in the Right Direction”, *Anti-Terrorism and Charity Law Alert No. 17*, online: <<http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>>.

2. It creates an undue sense of simplicity compared to the detailed guidance of other jurisdictions;
 3. It serves as a reference only while delegating the provision of actual guidance to other jurisdictions and quasi-governmental bodies referred to within the checklist; and
 4. Its recommendations are at times excessive; for example, the recommendation to not only know the individuals using a charity's facility but to also know the topics being discussed and materials being distributed.
- b) United States Department of the Treasury

The U.S. Treasury Department has made the oversight and regulation of charities and NGOs a particular focus of its anti-terrorism initiatives. The Office of Foreign Assets Control ("OFAC") is in charge of administering and enforcing U.S. economic sanctions programs which include sanctions against foreign states, terrorists, and international narcotics traffickers.⁸² Investigations revealed that terrorist organizations have exploited the vulnerability of the charitable sector, both in the U.S. and worldwide, in order to raise funds and support for their organizations and operations.

OFAC offers charitable organizations assistance with understanding and complying with their legal obligations under the sanctions programs while delivering aid in high-risk areas. Charities are encouraged to develop proactive and risk-based compliance programs in order to protect their assets and resources from potentially being diverted by terrorists. OFAC provided a "Risk Matrix for the Charitable Sector" ("Risk Matrix") of common risk factors associated with the disbursement of funds and other resources to "grantees," meaning an immediate grantee of charitable resources or services (see Appendix A).⁸³ This matrix is important not only for charities that operate internationally, but also for those charities that transfer funds cross-border, work with international partners, and utilize foreign financial institutions.

This Risk Matrix is designed to provide the charitable sector with an understanding of the risks that it should consider in the course of conducting its due diligence. The Risk

⁸² See U.S. Department of Treasury website online: <<http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>>.

⁸³ U.S. Department of Treasury's Office of Foreign Assets Control, "Risk Matrix for the Charitable Sector", online: <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf>.

Matrix is not a comprehensive list of risk factors indicating abuse or exploitation of charities or its operations, nor is it meant to establish whether or not an associate is engaged in illicit activities. In this regard, any of the risks highlighted in the Risk Matrix could constitute normal business operations for certain charities, given the resources they possess, the environments in which they work, and the constraints under which they operate. Use of or adherence to the Risk Matrix does not excuse any person from compliance with any local, provincial/state, or federal law or regulation, nor does it release any person from or constitute a legal defence against any civil or criminal liability for violating any such law or regulation.

3. In-House Due Diligence

a) Due Diligence through Education

First and foremost, lawyers must educate their charitable clients, especially senior management, officers and directors, about the requirements of domestic legislation and international best practice guidelines, encouraging them to develop a proactive response and assisting them in the creation and implementation of an effective anti-terrorism policy. Charities should continually educate their directors, staff, members, donors, and agents about the applicable legal requirements. They should develop access to general resource materials on anti-terrorism legislation in Canada and in all other countries in which they operate.

Charities need to compare and coordinate educational materials with other charities, either directly or indirectly, through umbrella organizations. Communicating with other organizations can help charities learn from each other's mistakes and successes, as everyone struggles to understand the full implications of these legislative initiatives. As they develop a body of material on the legislation and on their unique risks, charities need to provide ongoing educational materials and presentations to board members, staff, volunteers, donors and agents of the charity to keep them up-to-date about developments in the law and the enforcement of these laws.

b) Due Diligence at the Board Level

In light of the heightened expectations on charities under the anti-terrorism legislation, it will be important to choose the directors of a charity very carefully. The importance for the organization in avoiding association with a director who may have ties to terrorist organizations is obvious. In this regard, it would not be unreasonable to assume that CRA may conduct Canadian Security Intelligence Service (“CSIS”) security checks of board members of both new and existing charities. The discovery of even a suggested link between a director and a terrorist group could expose the charity to de-registration or failure to obtain registration in the first place. Potential board members should therefore be advised that a CSIS security check may be carried out on them by CRA.

As the charity implements its new anti-terrorism policy statement and procedures, all new and existing board members should be required to complete disclosure statements so that an assessment of compliance with anti-terrorism legislation can be made. These disclosure statements should include consents from the directors to share the results of such statements with legal counsel, board members, executive staff, and nominating committee members, if applicable. Moreover, such disclosure statements should be required regularly, for example yearly, in order to enable the charity to determine compliance with anti-terrorism legislation on an ongoing basis. The director’s consent to be a director should include an undertaking to immediately report any material change in the director’s circumstances that might affect the disclosure statements.

Once directors have passed the charity’s screening procedures determined to meet the requirements of its anti-terrorism initiatives, they must exercise continued vigilance and due diligence in the conduct of the charity’s affairs. Directors should continually educate themselves and the members and donors of their charities about legal developments in this area. They must also familiarize themselves with the activities of their own organization and about possible risk areas with respect to the day-to-day work and programs of the charity itself, as well as its affiliated organizations, donors, and agents. Directors must also continue to actively supervise the staff and volunteers of the organization and to ensure that staff and volunteers meet the organization’s policy requirements.

c) Due Diligence at Staff and Volunteer Level

Like directors, existing and potential staff members in key positions should be advised that CSIS security checks might be carried out on them. They should be required to complete initial disclosure statements and consents and to provide an undertaking to immediately report any change in circumstance that might be relevant to their disclosure statements. Like directors, key staff members should also be required to complete these disclosures annually. Staff and volunteers, both current and prospective, should be required to complete disclosure statements and consents along with an undertaking to report any material change in circumstance that might be relevant to the disclosure statements. Staff and key volunteers should also be requested to complete yearly disclosure statements to permit an ongoing review of compliance with anti-terrorist legislation.

d) Due Diligence Checklist of Charitable Programs and Ongoing Assessments of Projects

A due diligence checklist should be developed in keeping with the unique characteristics of each charity. The checklist should identify and eliminate potential risk areas for the particular charity, taking into consideration how the anti-terrorism and related legislation will apply to its unique programs. At the same time, it must be designed in order to give guidance to the charity on how to continue to be effective in meeting its charitable objects and avoid unnecessary limitations on its activities. The due diligence checklist should be designed to enable the charity to assess the level of compliance of its charitable programs with anti-terrorism legislation and the level of risk that each of its programs might pose. All relevant aspects of anti-terrorism legislation and of the charity's anti-terrorism policy that apply to its charitable programs should be incorporated into the due diligence compliance checklist. The checklist should reflect the "Super *Criminal Code*," money-laundering and terrorist financing provisions, as well as any relevant provisions in the *Foreign Missions Act* and the *Public Safety Act*. CRA's *Checklist for charities on avoiding terrorist abuse*, described above, could be a starting point for charities for reference purposes.

Each existing and proposed charitable program should be evaluated in accordance with the due diligence compliance checklist. All new and proposed programs should be

screened using the due diligence checklist as part of the initial decision of whether to undertake a program or not. A comprehensive review of all ongoing charitable programs should also be conducted on a regular basis, for example once a year. The results of all such due diligence audits should be communicated to the board of directors promptly.

e) **Due Diligence Concerning Umbrella Associations**

Umbrella associations to which a charity belongs can expose the charity, the umbrella association itself, and other members of the association to the risk of being part of a “terrorist group.” Charities should demand a high standard of diligence and be vigilant in monitoring the compliance of any umbrella associations to which they belong. Members of an umbrella association should be required to submit disclosure statements to determine compliance with anti-terrorism legislation. These disclosure statements should include consents to share the results of the statements with the directors of the umbrella association, as well as with its members. The consents from members should also include an undertaking to immediately report any material change in the disclosure statements. Members of the umbrella association should be required to submit updated disclosure statements annually to confirm ongoing compliance with anti-terrorism legislation. Charities should also encourage umbrella associations to require members of the umbrella association to adopt their own anti-terrorism policy statements.

4. **Due Diligence Concerning Third Parties**

a) **Due Diligence Concerning Affiliated Charities**

Charities should also conduct a comprehensive anti-terrorism audit of the organizations, individuals, and institutions they are affiliated with. This would include (as mentioned above) umbrella associations to which the charity belongs or, if the charity itself is an umbrella organization, other organizations that are members of the charity. It would also include other registered charities in conjunction with which the charity works, whether through informal cooperation or by formal joint venture or partnership agreements. Affiliated charities that either receive funds from the charity or give funds to the charity can put the charity at risk if they are not complying with the *Anti-terrorism Act*.

b) Due Diligence with Regard to Third Party Agents

All third party agents of a charity, including agents that act on behalf of a third party agent, can expose the charity to liability by directly or indirectly being involved in the facilitation of a “terrorist activity.” In addition to reviewing third parties for potential risks, charities should encourage their agents to take their own steps to ensure compliance with the law by establishing anti-terrorism policies and regular audits, due diligence check-lists, etc. Agents should be required to provide releases and indemnities to the charity in the event of non-compliance with anti-terrorism legislation. Third party agents may include foreign financial institutions and recipient or subcontracting organizations.

c) Due Diligence Concerning Donors

Charities should exercise vigilance in monitoring incoming donations with respect to the identity of the donor, and the manner in which the donor obtained the funds, as well as with regard to any donor restrictions on donated funds that could put the charity in contravention of anti-terrorism legislation. Charities must regularly review their donor-lists for “listed entities” or organizations that may be terrorist groups, affiliated with terrorist groups, or inadvertently facilitating terrorist activity. They must also ensure that a donor would not be able to use any of the charity’s programs to permit the flow-through of funds directly or indirectly to a terrorist activity.

d) Due Diligence Concerning Publications, Websites, and Public Statements

Charities should exercise vigilance in monitoring the content of their public communications. A charity must assume that the contents of publications, websites and the substance of all public statements are being, or may be in the future, reviewed by governmental agencies in the course of preliminary anti-terrorism investigations. This type of in-house due diligence should also be carried out with respect to third parties with whom the charity is associated. Public communications that may be perceived in any way as constituting the support or tolerance of an entity associated in any way with terrorism could result in serious, detrimental consequences for a charity, even if the communications are only loosely associated with the charity.

5. Documenting Due Diligence

a) Anti-terrorism Policy Statements

An anti-terrorism policy statement is a charity's obvious first line of defence to show that it has addressed the possible risks to the charity and is making every effort to comply with applicable legislation. Along with the due diligence checklist, it is also a very effective tool to educate a charity's directors and officers about the charity's potential risks and liabilities. An anti-terrorism policy statement must be carefully thought out with the guidance of legal counsel. The full cooperation of the charity's board and officers is necessary in order to make the policy statement reflect the individual needs and risks of each charity and to enable it to continue to meet its charitable objectives with the least possible interference. The process of preparing such a statement will, of course, require a comprehensive review of the charity's operations in order to identify the charity's risks and objectives. In fact, a charity's anti-terrorism policy statement should include a requirement to complete a comprehensive audit of the charity's existing programs on a regular basis and of all new program proposals as part of the initial review to decide whether to undertake a new program. These audits should be executed in accordance with the due diligence checklist which reflects the unique characteristics of each charity.

An appropriate policy adopted with the direction of legal counsel will give the organization guidance on how to document all other aspects of due diligence related to anti-terrorism, including all applicable documents, such as statements of disclosure and checklists. It will identify documents that could be filed with third parties such as CRA as preventive measures and describe how to meet reporting requirements in the event that there is an actual or potential violation. The anti-terrorism policy may be published on the charity's website, with excerpts possibly being reproduced in reports and brochures of the charity, as well as in communications to donors.

As the above suggests, a boilerplate anti-terrorism policy will likely be ineffective. The following provides a skeleton view of the contents of an anti-terrorism policy:

- Preamble: the preamble will generally set out, in brief terms, the nature of the organization, its statement of faith or the objects of the organization, as well as a

statement with respect to the incompatibility of the organization's beliefs and/or goals and any acts of terrorism;

- **Definitions:** although this is self-explanatory, it is important to ensure that certain terms are clearly spelled out, including the definition of terrorism, terrorist group, as well as detailing the persons to whom this policy will apply. With respect to the definition of "terrorism" and "terrorist group," it is best to adhere to statutory definitions in force in the organization's jurisdiction;
- **General Policy Guidelines and Principles:** under this heading, the organization should set out its commitment to complying with anti-terrorism laws, both domestically and in the foreign countries in which they plan to operate, ensuring compliance with any investigations by law enforcement authorities. The organization will also want to indicate that the organization will promptly review any concerns or allegations of non-compliance with legal counsel and review such advice with the board;
- **Reporting:** this section of the policy will detail the reporting requirements should anyone become aware of any concerns or allegations of non-compliance. The organization will likely want to set out when law enforcement or tax authorities should be consulted and who is responsible for such actions;
- **Program Review:** as was discussed above, program reviews are an essential component of demonstrating due diligence. This section of the policy should set out when such program reviews will be conducted. It is advisable to ensure that programs are reviewed on a regular basis, not just on start-up;
- **Donor Review:** donors, as much as recipients, can compromise the integrity of the organization. As such, the anti-terrorism policy should establish the threshold for investigating the donor, and the information required from donors before the charity is satisfied;
- **Review of Participants:** the policy should set out which participants are to be subject to review, and what information will be required;

- Review of Associates: as with the participant review, the policy should set out which associates are to be subject to review, and what information will be required;
- Financial Governance: as detailed above, both the domestic legislation and FATF Guidelines have set out strict requirements in relation to financial governance. This section of the policy should confirm compliance with those measures, and set out the due diligence requirements the organization has in place in order to ensure the charity's funds do not fall into the wrong hands;
- Review and Amendment of Anti-Terrorism Policy: as is the case with most policies, the organization should commit to reviewing the anti-terrorism policy on a regular basis, and making appropriate amendments to the policy as is required by changing national and international requirements;
- Schedules: the Schedules should contain the checklists for the various reviews discussed above, i.e. Program Review Checklist, Donor Review Checklist, etc., as well as a Waiver and Release that will enable the charity to terminate the relationship with a participant, member or client if the individual or entity is compromised by any connection to terrorist activity or groups. This is also an appropriate place to reproduce the lists of "Listed Entities" from the Solicitor General and the United Nations, or other sources, as well as information on how to obtain updated lists in this respect.

b) Evidencing Due Diligence with CRA

Canadian-based charities should forward as much evidence of due diligence compliance to CRA as possible. This would include forwarding a copy of the anti-terrorism policy, along with a request that CRA advise the charity of any deficiencies in the policy statement. If the charity is considering embarking on a new program and it is not clear whether the proposed program would result in non-compliance, a letter granting advance approval of the program should be sought from CRA. Also, copies of all agency agreements should be filed with CRA with a request that CRA approve the agreements specifically as they relate to compliance with the anti-terrorism legislation.

c) Evidencing Due Diligence with Legal Counsel

Legal counsel is an important part of the due diligence strategy of a charity. The very act of involving legal counsel can provide tangible evidence of due diligence and can assist in insulating the charity and its directors from liability. However, legal counsel can also help to identify risk areas and recommend strategies for addressing actual or potential risks. Legal counsel should review, comment and amend anti-terrorism policy statements, disclosure statements, due diligence compliance checklists, and the particulars of a charitable program. Legal counsel can also assist in communicating with CRA in evidencing due diligence compliance.

J. CONCLUSION

The collective insecurity resulting from September 11 and subsequent terrorist acts has served as a catalyst for the introduction of extraordinary laws in Canada and elsewhere aimed at curtailing the threat of further terrorist attacks and the ability of such terrorist organizations to finance their operations. As a result, it is no longer possible for charities participating in international initiatives to ignore this new international reality. The ramifications of anti-terrorism legislation and its threat to the rule of law for charities in Canada are broad and unprecedented, with the full impact only now beginning to be felt. The legislation necessitates a concerted proactive and vigilant response on the part of charities, their directors, executive staff and legal counsel. Charities will therefore need to diligently educate themselves about its requirements and undertake all necessary due diligence measures to ensure compliance as best they can.

APPENDIX A
U.S. Department of Treasury
Risk Matrix for the Charitable Sector

Introduction

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is charged with administering and enforcing U.S. economic sanctions programs, which include a range of sanctions against foreign states, terrorists, international narcotics traffickers, and other specially designated targets. Since September 11, 2001, a number of investigations in the United States and abroad, as well as reports by international organizations and in the media, have revealed the vulnerability of the charitable sector to abuse by terrorists, rogue actors, and other sanctions targets. In particular, terrorist organizations have exploited charitable organizations, both in the United States and worldwide, to raise and move funds, provide logistical support, or otherwise cultivate support for their organizations and operations.

This type of abuse can result in violations of OFAC-administered economic sanctions programs. For this reason, OFAC has actively engaged with charitable organizations to assist them in understanding and complying with their legal obligations under U.S. sanctions programs while delivering aid in high-risk areas.¹ OFAC has encouraged charities to develop proactive, risk-based compliance programs, informed by best practices, to protect their assets and resources from diversion or exploitation by rogue actors, terrorists, or other sanctions targets.²

To assist the charitable sector in adopting an effective, risk-based approach, OFAC is providing this matrix of common risk factors associated with disbursing funds and resources to grantees.³ This matrix will be particularly useful to charities that conduct overseas charitable activity due to the increased risks associated with international activities.⁴ The matrix is designed to provide charities with an understanding of the risks that they should consider in the course of conducting their due diligence. However, the matrix is not a comprehensive list of risk factors indicating abuse or exploitation of a particular charity or its operations, nor is it meant to establish whether or not a charity or grantee is engaged in illicit activities. Any of the risks highlighted in this matrix could constitute normal business operations for certain charities, given the resources they possess, the environments in which they work, and the constraints under which they operate. We hope that charities find this matrix to be a helpful tool in developing an appropriate compliance program.

Risk Factors for Charities Disbursing Funds or Resources to Grantees⁵

Low Risk	Medium Risk	High Risk
The grantee has explicit charitable purposes and discloses how funds are used with specificity.	The grantee has general charitable purposes and discloses how funds are used with specificity.	The grantee has general charitable purposes and does not disclose how funds are used.
The charity and the grantee have a written grant agreement that contains effective safeguards. For example, provisions addressing proper use of funds by the grantee, delineation of appropriate oversight, and programmatic verification.	The charity and the grantee have a written grant agreement with limited safeguards.	The charity and the grantee do not have a written grant agreement.
The grantee has an existing relationship with the charity.	The grantee has existing relationships with other known charities but not with this charity.	The grantee has no prior history with any charities.
The grantee can provide references from trusted sources.	The grantee's references are from sources with which the charity is unfamiliar.	The grantee can provide no references or sources to corroborate references provided.
The grantee has a history of legitimate charitable activities.	The grantee is newly or recently formed, but its leadership has a history of legitimate charitable activities.	The grantee has little or no history of legitimate charitable activities.
Charity performs on-site grantee due diligence through regular audits and reporting.	Charity performs remote grantee due diligence through regular audits and reporting.	Charity performs no grantee due diligence, or due diligence is random and inconsistent.
Grantee provides documentation of the use of funds in the form of video, receipts, photographs,	Grantee provides documentation of the use of funds. Documentation may only include receipts and	Grantee provides no documentation of use of funds.

testimonies, and written records.	written records.	
The charity disburses funds in small increments as needed for specific projects or expenditures.	The charity authorizes grantee discretion within specified limits.	The charity disburses funds in one large payment to be invested and spent over time or for unspecified projects selected by the grantee.
Reliable banking systems or other regulated financial channels for transferring funds are available and used by the grantee, subjecting such transfers to the safeguards of regulated financial systems consistent with international standards.	Reliable banking systems or other regulated financial channels for transferring funds are not reasonably available for the grantee's relevant activity, but the charity and the grantee agree on alternative methods that they reasonably believe to be reliable, trustworthy, and protected against diversion.	The grantee does not use regulated financial channels or take steps to develop alternative methods that the charity and grantee reasonably believe to be reliable, trustworthy, and protected against diversion.
Detailed procedures and processes for the suspension of grantee funds are included within the written agreement and enforceable both in the United States and at the grantee's locale.	Detailed procedures and processes for the suspension of grantee funds are included within the written agreement but may not be enforceable at the grantee's locale due to instability or other issues.	There exist no procedures or processes for suspension of grantee funds in the event there is a breach of the written agreement.
The charity engages exclusively in charitable work in the U.S. or in foreign countries/regions where terrorist organizations are not known to be active.	The charity engages in some work in foreign countries/regions where terrorist organizations may be active.	The charity primarily engages in work in conflict zones or in countries/regions known to have a concentration of terrorist activity.

¹ Engaging in a prohibited sanctions transaction, including one with a person on the Specially Designated Nationals and Blocked Persons List, administered by the Office of Foreign Assets Control ("OFAC"), is a violation of U.S. law. Nevertheless, in implementing and enforcing sanctions programs, OFAC recognizes that charities and their grantees differ from one another in size, products, and services, sources of funding, the geographic locations that

they serve, and numerous other variables. OFAC will take these variables into account in evaluating the compliance measures of charities. OFAC addresses every violation in context, taking into account the nature of a charity's business, the history of the group's enforcement record with OFAC, the sanctions harm that may have resulted from the transaction, and the charity's compliance procedures.

² To assist charities in protecting their funds against terrorist diversion, Treasury developed the Anti-Terrorist Financing Guidelines: Voluntary Practices for U.S.-Based Charities ("Guidelines") and released them in November 2002. In December 2005, after extensive public comment and numerous outreach engagements with the sector, Treasury revised the Guidelines and released them in draft form for public comment. Based on the comments received, in September 2006, Treasury released an updated version of the Guidelines. These updated Guidelines encourage charities to adopt a risk-based approach in developing protective measures to guard against the risk of terrorist abuse. They acknowledge that charities are in the best position to understand and address the specific risks they face in their operations. The Guidelines also reference various materials that demonstrate and describe the ongoing risks of terrorist abuse of the charitable sector. Many of these materials are available on the Treasury Web site at <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>.

³ This risk matrix is designed to assist charities that attempt in good faith to protect themselves from abuse by sanctioned parties or other bad actors and are not intended to address the problem of organizations that use the cover of charitable work, whether real or perceived, to provide support for illicit causes. The matrix is not mandatory; non-adherence to this guidance, in and of itself, does not constitute a violation of existing U.S. law. Conversely, adherence to the risk matrix does not excuse any person (individual or entity) from compliance with any local, state, or federal law or regulation, nor does it release any person from or constitute a legal defense against any civil or criminal liability for violating any such law or regulation. In particular, adherence to the risk matrix shall not be construed to preclude any criminal charge, civil fine, or other action by Treasury or the Department of Justice against persons who engage in prohibited transactions with persons designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, as amended, or with persons designated under the criteria defining prohibited persons in the relevant Executive orders issued pursuant to statute, such as the International Emergency Economic Powers Act, as amended.

⁴ The term "grantee," as it is used throughout the matrix, means an immediate grantee of charitable resources or services. To the extent reasonably practicable, charitable organizations should also use the matrix and the Guidelines to ensure the safe delivery of charitable resources by any downstream sub-grantees.

⁵ OFAC appreciates The American Bar Association's instructive comments on risk factors listed in Table 1 of Comments in Response to Internal Revenue Service Announcement 1003-29, 2003-20 I.R.B. 928 Regarding International Grant-Making and International Activities by Domestic 501(c)(3) Organizations, July 18, 2003 (Comment). The Comment represented the views of individual members of the Committee on Exempt Organizations of the Section of Taxation and contained recommendations on how the IRS might clarify existing requirements of section 501(c)(3) organizations with respect to international grant-making and other international activities. .